Supreme Court, U. S.
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71-1520

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

FRANK KIRKPATRICK,

Petitioner

v.

THE STATE OF WISCONSIN
(Department of Natural Resources),

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

Petitioner, Frank Kirkpatrick, prays that this Court direct its writ of certiorari to the Supreme Court of Wisconsin to review the Decision of the Wisconsin court entered January 4, 1972, and its denial of rehearing thereof on February 29, 1972.

OPINIONS BELOW

The decision of the Supreme Court of Wisconsin and of its denial of rehearing with respect to said decision, are set forth in Appendix A hereof, the decision being reported in 53 Wis. 2d 522, 192 N. W. 2d 856. Petitioner's Offer of Proof and the trial court's unconstitutional refusal to consider it on its merits, affirmance of which is hereby sought to be reviewed, are also set forth in Appendix B hereof. (Appendices cited as A p. __a).

JURISDICTION

The decision of the Supreme Court of Wisconsin sought to be reviewed was filed January 4, 1972. A timely Motion for Rehearing was filed, and was denied on February 29, 1972. Jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3).

QUESTION PRESENTED FOR REVIEW

Does not the Fourteenth Amendment of the United States Constitution nullify a State Supreme Court ruling conclusively presuming incompetent, and hence prohibiting consideration even by the trial judge of the most positive proof of facts capable of ocular or tangible evidence to overcome said presumption, to-wit, that a purchase price paid by the State was essentially consensual and the land purchased comparable to land being condemned, which evidence condemnee proffered to assist the jury in determining just compensation due him?

CONSTITUTIONAL PROVISIONS AND WISCONSIN STATUTES INVOLVED IN THIS PETITION FOR CERTIORARI

Wisconsin Constitution, Section 13, Article I.

> "The property of no person shall be taken for public use without just compensation therefor."

Amendments to the United States Constitution, Article XIV, Section 1.

> "* * * nor shall any State deprive any person of * * * property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 32.06, Wisconsin Statutes.

> "Condemnation procedure in other than highway, etc. matters.
>
> * * *
>
> (2a) AGREED PRICE. Before making the jurisdictional offer provided in sub (3) the condemnor shall attempt to negotiate personally with the owner or one of the owners or his personal representative of the property sought to be taken for the purchase of the same. In such negotiation the condemnor may con-

tract to pay the items of compensation enumerated in ss. 32.09 and 32.19 where shown to exist."

Section 32.09, Wisconsin Statutes.

"Rules governing determination of just compensation. In all matters involving the determination of just compensation in eminent domain proceedings, the following rules shall be followed:

* * *

(8) A commission in condemnation or a court may in their respective discretion require that both condemnor and owner submit to the commission or court at a specified time in advance of the commission hearing or court trial, a statement covering the respective contentions of the parties on the following points:

* * *

(c) Designation of claimed comparable lands, sale of which will be used in appraisal opinion evidence.

STATEMENT OF THE CASE

Petitioner prior to 1959 acquired for development and sale for residential and recreational uses over 138 acres of land in Door County, Wisconsin. Petitioner, who was 72 years of age at the time of the trial, had been licensed as a real estate broker in Pennsylvania and for some years later had been licensed as a real estate broker in Wisconsin. He had for many years been in the business of building houses, including subdividing and development of land and selling lots. Petitioner directed war housing for the Milwaukee area during the war years. (W. Ap. p. 184). *

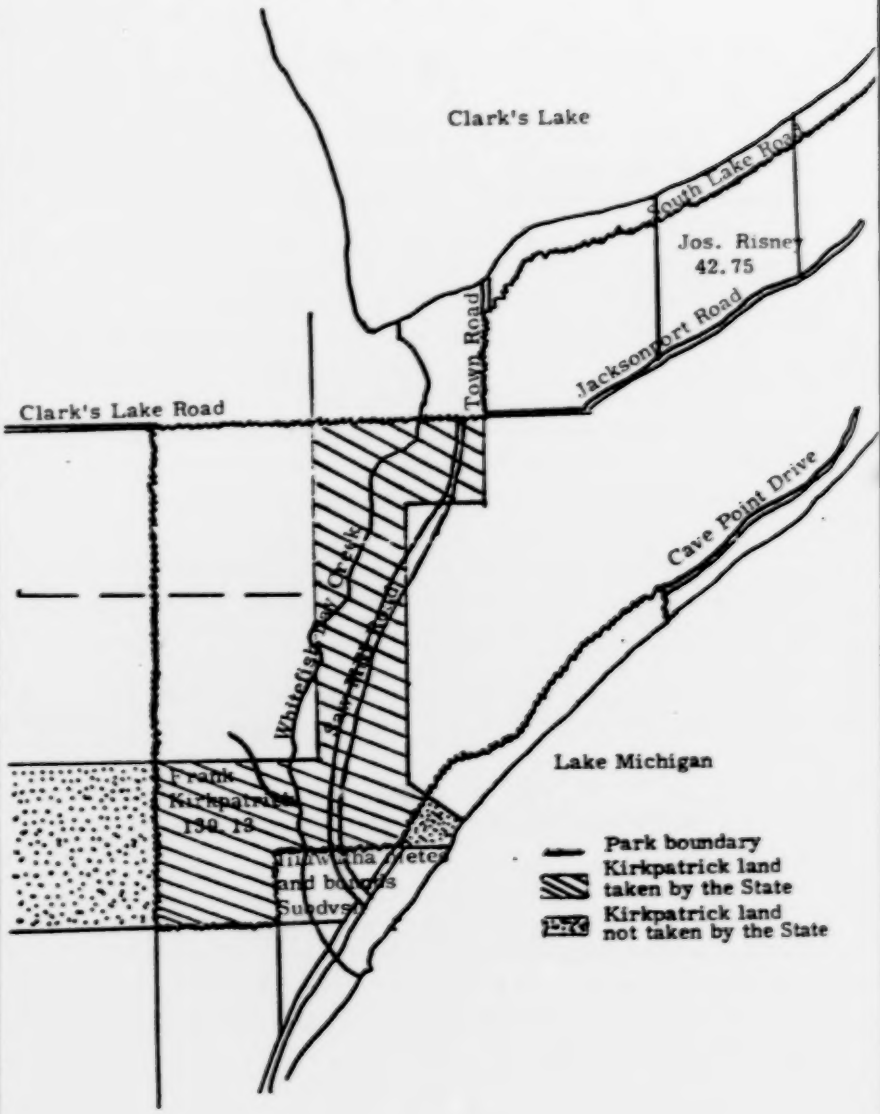
Petitioner's Door County land (see sketch presented in brief to the Wisconsin Supreme Court and set out here on page 5.1):

(1) had a little less than two acres east of Cave Point Drive with a 120 foot frontage on Lake Michigan,

(2) extended westerly about two-thirds of a mile, and

(3) northerly about two-thirds of a mile to a 1320 foot frontage on the east-west Clark's Lake Road, less than a quarter-mile south of Clark's Lake but intersecting a public road leading to Clark's Lake.

*Certified Appendix in the Wisconsin Court, of which Appendix B herein is a part, cited.


Clark's Lake
South Lake Road
Jos. Risney
42.75
Jacksonport Road
Town Road
Clark's Lake Road
Cave Point Drive
Lake Michigan
Park boundary
Kirkpatrick land taken by the State
Kirkpatrick land not taken by the State

Petitioner's land was bisected from north to south by the Saw Mill Road and by Whitefish Bay Creek, a trout stream running southerly from Clark's Lake to Lake Michigan. A tributary trout stream from the northwest joined the Whitefish Bay Creek on Petitioner's lands. The portion of Petitioner's land west of Cave Point Drive, which was taken for the State Park, had a varied terrain. The easterly portion was a stabilized sand dune area on which very large growing trees existed, with a 500 foot frontage on Cave Point Drive extending westerly almost 900 feet; the westerly portion of the condemned lands consisted of large areas with second growth timber located on either side of the Saw Mill Road and Whitefish Bay Creek and said tributary trout stream. (See sketch at p. 5.1 and W. Ap. pp. 243-245).

Respondent State condemned for Whitefish Bay State Park approximately 98 acres of Petitioner's land as of October 11, 1968, i.e., all his Door County lands except the approximately two acres between Cave Point Drive and Lake Michigan and the most westerly forty acres. Said Park, of which Petitioner's lands comprised a substantial portion, was described in the 1967 Door County Board resolution authorizing it as "possessing unusual scenic value", as being a "unique area", and as having been recognized as such "by both state and federal agencies for many years." (W. Ap. pp. 132-134).

One of Petitioner's appraisers Oleson based his appraisal of the fair market value of Petitioner's 98 acres in part upon the purchase from one Risney by the State for said park of less

than 36 acres of vacant land for $36,000. (W. Ap. p. 117). The Risney land consisted of 42.75 acres, of which the State acquired about 36 acres south of South Lake Road and fronting on Jacksonport Road, an extension of Clark's Lake Road. Risney was preparing to subdivide the 36 acres fronting on Jacksonport Road, situated approximately 500 yards northeasterly of Petitioner's Clark's Lake Road frontage. (A p. 12a and sketch on p. 5.1).

In 1967 the State had started negotiations for the Risney lands pursuant to Section 32.06(2a) of the Wisconsin Statutes. Upon a telephone inquiry by Risney in February, 1969, the State offered $36,000 for said lands, and Risney gave the State an option to purchase his said lands for $36,000. The purchase was consummated at this price shortly thereafter, the deed being recorded in July, 1969. (A p. 13a and W. Ap. pp. 116-118). Petitioner offered to prove this purchase involved the only sizable conveyance of land close in proximity to his lands both physically and in point of time. (W. Ap. p. 169).

These facts, pursuant to Section 32.09(8)(c) of the Wisconsin Statutes, were brought to the attention of the trial judge prior to the trial.

Petitioner himself a prospective witness at the trial proposed to offer said Risney land purchase data as direct evidence and as an admission by the State of fair market value of lands comparable to the westerly portion of his lands within four months of the date of the taking of Petitioner's lands. The Risney option and the deed became a matter of public record by their

recording in the office of the Register of Deeds in Sturgeon Bay, Door County, Wisconsin, long before the trial in May, 1970. (W. Ap. pp. 116-118).

The trial judge, over objection of Petitioner based on the Fourteenth Amendment to the Federal Constitution, even prior to trial (W. Ap. pp. 122-123, 169-170) refused (a) to consider on its merits the claimed similarity to Petitioner's lands of the Risney lands or of the similarity of the factors entering into the price paid Risney with the fair market value of the westerly portion of Petitioner's lands, or (b) to receive in evidence testimony of the Risney land purchase. The rulings were based on Blick v. Ozaukee County (1923), 180 Wis. 45, 192 N.W. 380 (set out in Appendix C of this Petition), holding that receipt of evidence of a State purchase in a condemnation proceeding would ipso facto be reversible error. The trial judge even directed counsel that as a matter of law he could not advert to or cause witnesses to refer to the Risney land purchase data either in direct examination or in cross-examination. (W. Ap. p. 170). This constitutional issue was also raised and rejected in the Supreme Court. (A p. 5a).

Petitioner's appraiser Oleson, who had relied upon the Risney land purchase for his opinion as to the market value of Petitioner's land, testified as to his opinion of Petitioner's 98 acres taken by the State, but was not allowed to refer to the Risney land purchase on which his opinion was in part based. Oleson's appraisal report (Exhibit 8, W. Ap. pp. 143-146) was proffered and received in evidence only after his reference therein to the Risney land purchase had been blocked out.

(W. Ap. p. 200).

Without being allowed to refer to the Risney land purchase, Petitioner testified that in his opinion just compensation for his 98 acres was the $148,775 value of his lands before the taking and $19,500 after the taking, i.e., just compensation was $129,275. (W. Ap. p. 188), a figure lower than either of his two appraisers. (W. Ap. pp. 242, 246).

The jury, in ignorance of the Risney land purchase by the State at over $1,000 an acre, found just compensation for Petitioner at $60,000 (W. Ap. p. 106), i.e., an average of $612 an acre. The appraisals of the three appraisers produced by the State ranged from a low of $42,700 (W. Ap. p. 197) to a high of $53,800. (W. Ap. p. 191). Judgment on the jury verdict was duly entered. (W. Ap. pp. 102-107).

On appeal, the Wisconsin Supreme Court stated the issue (Appendix A of this Petition, A pp. 2a-3a) as follows:

> "Prior to trial, appellant [Petitioner] notified the court and opposing counsel of his intent to introduce evidence of a recent purchase by the State of approximately 36 acres of land within the Whitefish Bay State Park project from a Mr. Risney for $36,000. This sale was claimed to be relevant as evidence of the value of comparable land and as an admission against interest. The state objected to its admission, and the trial court, basing its deci-

sion on Blick v. Ozaukee County (1923), 180 Wis. 45, 192 N. W. 380, held that evidence of sales of property subject to condemnation to the condemning authority is inadmissible. Appellant contends that this ruling was erroneous."

The rule in the Blick decision involved facts which the Wisconsin court described as follows:

> "In the instant case [Blick] the land actually taken was .7 of an acre. The land actually taken from the adjacent property owner was one acre. Under the most extravagant testimony its value did not exceed $400. At least the difference between that and the $1,000 paid represented consequential damages. The admission of the evidence as to the amount paid the adjacent property owner was not preceded by any proof of the similarity of the consequential damages sustained by plaintiff and the adjacent property owner, although there was a meager reference to it in the later testimony. However, with the recognition of such a rule, the subject could well have formed a stubborn issue upon which numerous witnesses could have been called by both parties, with distracting and unsatisfactory results. Such evidence, if admitted, in most cases would be remote, indirect, and unsatisfactory. We cannot sanction such an improvident rule." (Emphasis supplied). (See Appendix C of this Petition, A p. 21a).

The Wisconsin Supreme Court in the in-

stant case in affirming the rule in the Blick case, concluded:

> "Appellant [Petitioner] asserts that the conclusive presumption created by Blick is also an arbitrary classification, denying him of due process of law and of equal protection of the laws. It has been shown, however, that sound reasoning underlies the rule in the Blick case, and that the classification is therefore not arbitrary. Furthermore, Blick does not prevent the admission of all evidence pertaining to value; the only evidence excluded is that of sales of other property to the condemnor. Appellant [Petitioner] was afforded both due process and equal protection. We conclude, therefore, that the evidence of the Risney sale was properly excluded." (See Appendix A of this Petition, A p. 6a).

Moreover, in 1923, when the Blick case was decided, the Wisconsin Statutes did not, as they do now, (1) require prior independent appraisals of property to be condemned and then (2) require an attempt to acquire the property by negotiations (Section 32.06(2a), Wis. Stats.), and (3) provide for prior notice of and hence for review of contested comparable sales to be used by appraisers prior to trial or submission to a jury. (Section 32.09(8)(c), Wis. Stats.).

REASONS FOR GRANTING THE WRIT

It is manifest under the Wisconsin rule that evidence of the purchase price paid by the State for land cannot be presented by a condemnee to a jury to assist it in determining the value of the condemnee's land, even though the purchased land is physically proximate in location and comparable to the condemnee's land, and the purchase price paid by the State contains no factors not present in the determination of the fair market value of the condemnee's land by the jury. This prohibition continues to be upheld in Wisconsin notwithstanding that under present statutory requirements the State must obtain an independent appraisal of the property to be purchased (or condemned) and negotiate for the purchase and presumptively purchase the land at the said appraisal value or less prior to instituting condemnation proceedings. Such conclusive evidentiary presumptions (here that price was influenced by the power to condemn) have regularly been invalidated by this Court under the Fourteenth Amendment to the United States Constitution.

In Schlesinger, et al v. Wisconsin, et al, 270 U.S. 230, 46 S. Ct. 260, 70 L. Ed. 557, 43 A.L.R. 1224 (1925), this Court held violative of the Fourteenth Amendment a Wisconsin statutory provision that all gifts made within six years prior to death of the donor would be construed as having been made in contemplation of death because, as this Court stated at page 239, the statute

". . . undertakes to raise a conclusive

> presumption that all material gifts within six years of death were made in anticipation of it and to lay a graduated inheritance tax upon them without regard to the actual intent. The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere prima facie presumption of fact."

See also Heiner v. Donnan, 285 U.S. 312, 52 S. Ct. 358, 76 L. Ed. 772, upsetting a similar conclusive presumption under the Federal Revenue Act of 1926. "[A] statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment." Id. at 325.

Another Wisconsin tax statute challenged as unconstitutional permitted taxing a husband for income earned by his wife, the effect being a conclusive presumption that the wife's income inured to the benefit of and became the property of the husband notwithstanding complete emancipation of women in Wisconsin. This Court found the statute invalid in Hoeper v. Tax Commission, 284 U.S. 206, 52 S. Ct. 120, 76 L. Ed. 248 (1931), noting at page 215:

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due

> process of law as guaranteed by the Fourteenth Amendment."

In these decisions arguments based on necessity to avoid fraud have repeatedly been rejected: "The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever." Hoeper v. Tax Commission, supra, at 217.

The cases are not limited to taxation. In the 1965 decision of this Court in Carrington v. Rash, et al, 380 U.S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965), a Texas constitutional provision precluding a member of the armed forces from voting in Texas if he moved his home to Texas while in the course of his military duty, was ruled offensive to the Fourteenth Amendment because it in effect established a conclusive presumption of nonresidency incapable of being overcome by proof.

> "We recognize that special problems may be involved in determining whether servicemen have actually acquired a new domicile in a State for franchise purposes. We emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence. But this constitutional provision goes beyond such rules. '[T]he presumption here created is . . . definitely conclusive–incapable of being overcome by proof of the most positive character.' " Id. at 96.

The conclusive presumption that a woman can bear children was challenged in United States v. Provident Trust Co., 291 U.S. 272, 54 S. Ct. 389, 78 L. Ed. 793 (1934) in the face of proffered evidence that the woman in question was fifty years old (and had died by the time of the decision), was in poor health and under a physician's care, and had undergone surgery for removal of her reproductive organs. This Court disapproved application of the conclusive presumption in valuation of a contingent charitable remainder bequest dependent upon the life tenant dieing without issue. Quoting from Best, Presumptions of Law and Fact, Mr. Justice Southerland wrote in the Opinion at page 282:

> "'Many presumptions . . . which, in earlier times, were deemed absolute and irrebuttable, have, by the opinion of later judges, acting on more enlarged experience, either been ranged among praesumptiones juris tantum, or considered as presumptions of fact, to be made at the discretion of a jury. . . . By an arbitrary rule, to preclude a party from adducing evidence which, if received, would compel a decision in his favour, is an act which can only be satisfied by the clearest expediency and soundest policy; and it must be confessed that there are several presumptions still retained in this class which never ought to have found their way into it, and which, it is to be feared, often operate seriously to the defeat of justice.'"

This Court further observed from its earlier decision that " 'all presumptions as to matters of fact, capable of ocular or tangible proof, such as the execution of a deed, are in their nature disputable. No conclusive character attaches to them. They may always be rebutted and overthrown.' " Id. at 284. When "evidence of certain kinds of facts is [to be] excluded [it is] 'because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth.' " Id. at 285. Like Petitioner's right to just compensation for lands taken by the State of Wisconsin, "the sole question to be considered is—What is the value of the interest to be saved from the tax? That is a practical question, not concluded by the presumption invoked but to be determined by ascertaining in terms of money what the property constituting that interest would bring in the market, subject to such uncertainty as ordinarily attaches to such an inquiry." Id. at 286.

In the criminal field this Court, explicitly excluding from its analysis the effects of Fifth Amendment self-incrimination, has set aside under due process considerations even rebuttable presumptions. For example, in Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), a rebuttable presumption from possession of marijuana that the possessor knew it was illegally imported into the United States was ruled violative of due process as irrational or arbitrary, "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on

which it is made to depend." Id. at 36.

In Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943), extensively cited in the Leary decision, a statutory presumption in the Federal Firearms Act, again rebuttable, that from possession of a firearm or ammunition may be presumed that it was received by the possessor in interstate commerce, was held to fail to meet basic due process requirements. Only where inferences from the proved fact, other than the presumed fact, are "extraordinary and unusual" will the presumption be upheld; the inference must be in accord "with common experience" to such a degree "that a statutory provision scarcely was necessary to shift the burden of proof." Id. at 470, 471.

The Wisconsin rule disallowing a condemnee from having considered on its merits evidence of the price paid by the State for comparable property purchased contemporaneously with the nearby condemned property and for the same purpose is premised upon the conclusive presumption that the power of condemnation influenced the price; i. e., a presumption "incapable of being overcome by proof of the most positive character. Carrington v. Rash, et al, supra, at page 96.

This presumption as applied to condemnees in Wisconsin, fails to meet even the due process requirements for mere rebuttable presumptions. While a price accepted by a seller to a condemning authority may be influenced by the power of eminent domain, i. e., lead to a price lower than fair market value, the reverse is far

from meeting the tests of Leary and Tot that the inference that the State paid a higher price is in accord "with common experience" to such a degree "that a statutory provision scarcely was necessary to shift the burden of proof." Tot v. United States, supra, at 471. But, of course, here the presumption is conclusive, not merely rebuttable. As noted by the District of Columbia Circuit Court of Appeals in Nash v. D. C. Development Land Agency, 395 F. 2d 571 (D. C. Cir. 1967), cert. den. 393 U. S. 844 (1968), when recognizing that a selling landowner might well accept a price below market value because the purchaser has the power of eminent domain and hence the condemnor should not be permitted to offer this evidence the basis for prohibiting this evidence when offered by the condemnee disappears: "How it can be said to be under any significant compulsion to pay more for property than it is worth eludes me. . . . I cannot detect any element of coercion or compulsion that should invariably keep it from the jury's consideration." Id. at 576. "The reasons which disable a condemnor from putting in evidence of purchases it has made in settlement of condemnation suits have no application to a landowner who offers such evidence himself." Id. at 572, n. 6. In any event, the circumstances relating to the purchase price and to the land purchased, if receipt in evidence is challenged, should be considered on their merits by the trial judge.

The Wisconsin rule, which dates back to Blick v. Ozaukee County, 180 Wis. 45, 192 N. W. 380 (1923), is one of those "several presumptions still retained in this class which never ought to have found their way into it, and which . . . often

operate seriously to the defeat of justice." United States v. Provident Trust Co., 291 U. S. 272, 282, 54 S. Ct. 389, 78 L. Ed. 793 (1934). "[T]he sole question to be considered is—What is the value of the [property to be condemned]? That is a practical question, not concluded by the presumption invoked but to be determined by ascertaining in terms of money what the property . . . would bring in the market, subject to such uncertainty as ordinarily attaches to such an inquiry." Id. at 286. A proffer of evidence by the condemnee as to the value in issue cannot constitutionally be barred by the conclusive presumption inherent in the rule applied by the Wisconsin Supreme Court in this case.

CONCLUSION

For the foregoing stated reasons, this Court should grant Petitioner's prayer for the issuance of its writ of certiorari directed to the Supreme Court of Wisconsin, for review and reversal of the unconstitutional decision in Case No. 270, August term, 1971 on the calendar of said State Court.

Respectfully submitted,

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APPENDIX A

KIRKPATRICK, Appellant, v. STATE (Department of Natural Resources), Respondent.

No. 270. Argued December 2, 1971. Decided January 4, 1972.

(Syllabus omitted)

APPEAL from judgments of the circuit court for Door county: William J. Duffy, Circuit Judge. Affirmed.

Action by Frank Kirkpatrick, appellant condemnee, against the state of Wisconsin, respondent condemnor, to determine the amount of just compensation for the partial taking of appellant's land by eminent domain for park purposes.

On October 11, 1968, the state, through the Department of Natural Resources, condemned approximately 98 acres of appellant's 138 acres of land in Door county for Whitefish Bay State Park. Being dissatisfied with the jurisdictional offer of $49,105, appellant appealed to the circuit court; and a jury trial on the issue of compensation was held. The jury found that the fair market value of appellant's land prior to taking was $79,500, while the value of the land remaining after the taking was $19,500, resulting in damages of $60,000. The trial court rendered judgment on the verdict and a supplemental judgment confirming title to the condemned lands in the state. Appeal is taken from these judgments. * * *

HANLEY, J. Four issues are presented in this appeal:

(1) Was it error for the trial court to exclude proof of the amount paid by the state to the owner of other property which was part of the same project;

(2) Did the trial court err in not excluding the testimony of an appraiser called by the state, when a summary of his report was not given to appellant until shortly before the trial date;

(3) Should a new trial be granted because of an alleged failure to comply with secs. 270.21 and 270.22, Stats., relating to the recording of testimony and jury instructions; and

(4) Did the trial court err in instructing the jury on the burden of proof?

Evidence of other sales to the state.

Prior to trial, appellant notified the court and opposing counsel of his intent to introduce evidence of a recent purchase by the state of approximately 36 acres of land within the Whitefish Bay State Park project from a Mr. Risney for $36,000. This sale was claimed to be relevant as evidence of the value of comparable land and as an admission against interest. The state objected to its admission, and the trial court, basing its decision on Blick v. Ozaukee County (1923), 180 Wis. 45, 192 N. W. 380, held that evidence of sales of property subject to condemnation to the condemning author-

ity is inadmissible. Appellant contends that this ruling was erroneous. In Blick this court noted that the great weight of authority was to the effect that prices paid for other lands by the condemnor in settlement of condemnation proceedings should not be admitted into evidence. The reason for this rule was expressed by the court as follows, at pages 47 and 48:

> "There is a manifest difference between a bargain where one party has the legal right to acquire and the other must sell and a bargain where both parties are in the exercise of their own free will. One party may pay a little more or the other may take a little less to avoid the annoyance and expense of litigation, and the agreement thus reached does not necessarily indicate the fair market value of the property taken as that term is understood in the law. The infirmity of this class of evidence is more marked where the element of consequential damages forms a part of the compensation paid. That factor is as variable as the landscape and often includes intangible and aesthetic considerations. Situations legitimately comparable must of necessity be rare. Their establishment or attempted establishment would introduce aggravating and time-consuming collateral issues tending to promote confusion rather than clarity. . . ."

Appellant contends that the holding in Blick that such evidence was inadmissible is merely obiter dicta. A cursory reading of the Blick case

reveals that this contention is erroneous. Appellant further contends that subsequent cases have impliedly overruled Blick, citing Weeden v. Beloit (1966), 29 Wis. 2d 662, 139 N. W. 2d 616, and Bear v. Kenosha County (1963), 22 Wis. 2d 92, 125 N. W. 2d 375, for the proposition that evidence of comparable sales is admissible. That rule has never been questioned and was even recognized in Blick. The problem with evidence of sales of other land to the condemning authority is that the price may very well not be the fair market value of land, no matter how comparable the land may be in its physical aspects. This is so merely because the price is not determined by an arms-length transaction, but rather by dealings between one who must buy and another who has no choice but to sell.

Appellant directs the attention of this court to a number of decisions from other jurisdictions which hold that such evidence is admissible as pertaining to value of comparable property. We think the better rule is to exclude such evidence. The rule in Blick is followed by the majority of jurisdictions. See: Annot. (1962) 85 A. L. R. 2d 110, 163, sec. 10[a]; 27 Am. Jur. 2d, Eminent Domain, pp. 336, 337, sec. 430; 32 C. J. S., Evidence, p. 746, sec. 593(3)(f). Moreover, the reasoning behind the rule is still sound. As stated in 4 Nichols, Eminent Domain, Settlements, pp. 12-142 to 12-144, sec. 12.3113[2]:

> "The reasoning which forbids consideration of forced sales also renders it incompetent for either party to put in evidence the amount paid by the condemnor to the owners of neighboring lands taken

at the same time, and as part of the same proceedings, however similar they may be to that in controversy (irrespective of whether the payment was made as the result of a voluntary settlement, an award, or the verdict of a jury). The rights of an owner to recover just compensation for the taking of his land are not to be measured by the generosity, necessity, estimated advantage, or fear or dislike of litigation which may have induced others to part with the title to their real estate, or to relinquish claims for damages by reason of injuries thereto. It would be equally unwise, unjust and impolitic to make it impossible for a condemnor which has taken land by eminent domain to compromise the claims of one owner without furnishing evidence against itself in all similar claims. If a sale is made to a condemnor that is about to institute proceedings if it cannot acquire the land by purchase at a satisfactory price, the amount paid is not a fair test of market value. . . ."

Finally, appellant contends that the rule of Blick is arbitrary and violative of the fourteenth amendment to the United States Constitution. He cites Schlesinger v. Wisconsin (1926), 270 U. S. 230, 46 Sup. Ct. 260, 70 L. Ed. 557, to support his theory. That case held unconstitutional a Wisconsin statute which created a conclusive presumption that gifts made within six years of death were made in contemplation of death for inheritance tax purposes. The statute was found to create an ar-

bitrary classification which conflicted with the fourteenth amendment. Appellant asserts that the conclusive presumption created by Blick is also an arbitrary classification, denying him of due process of law and of equal protection of the laws. It has been shown, however, that sound reasoning underlies the rule in the Blick case, and that the classification is therefore not arbitrary. Furthermore, Blick does not prevent the admission of all evidence pertaining to value; the only evidence excluded is that of sales of other property to the condemnor. Appellant was afforded both due process and equal protection. We conclude, therefore, that the evidence of the Risney sale was properly excluded.

Admission of testimony of State's appraiser.

By letter dated December 11, 1969, and addressed to all counsel in the case, the trial court ordered the parties to exchange documents and data pursuant to sec. 32.09(8), Stats. No date was specified for this exchange. On March 18, 1970, the reports of two of appellant's appraisers were mailed to counsel for the state, with the information that a third appraiser might yet be used. The state, for its part, sent appellant the appraisals of two of its experts and advised appellant that a third appraisal existed but that it had not been decided whether to use that appraisal. No further reports were exchanged until May 15, 1970, when the state delivered to appellant the third report—the appraisal prepared by Michael Barnard. Trial was set for May 19, 1970, and Barnard was called as a witness for the state on May 21, 1970. The

admission of his testimony was objected to by appellant on the grounds that the state had violated the pretrial order of the judge and that appellant had insufficient time to prepare for the testimony of the expert. Appellant contends that the admission of Barnard's testimony was error and that he is, therefore, entitled to a new trial.

The facts herein are strikingly similar to those in Fredrickson v. Louisville Ladder Co. (1971), 52 Wis. 2d 776, 191 N. W. 2d 193. In that case a pretrial order directing the exchange of names of expert witnesses was violated by defense counsel who did not reveal that he had an expert witness until the morning the trial commenced. The trial court found that whatever prejudice suffered by the plaintiff by virtue of the late disclosure was substantially alleviated by permitting the expert's deposition to be taken during trial. This court affirmed on the basis that plaintiff had failed to show that the prejudice outweighed the probative value of the testimony.

In the instant case, appellant received the Barnard report on May 15, 1971; Barnard was not called as a witness until May 21. Therefore, appellant had over five days in which to examine the report and to do research on the qualifications of the witness. Presumably any discrepancies in Barnard's appraisal could have been discovered in that period of time. Appellant has failed to show how he was prejudiced in this case. We think the admission of the testimony was proper.

Alleged failure to record testimony and instructions.

Appellant contends that the verdict must be set aside for noncompliance with secs. 270.21 and 270.22, Stats. The pertinent provisions of these statutes read as follows:

> "270.21 Charge to jury; how given. The judge shall charge the jury and all such and subsequent instructions shall, unless a written charge be waived by counsel at the commencement of the trial be reduced to writing before being delivered or the same shall be taken down by the official reporter of the court. . . . If any judge shall violate any of the foregoing provisions or make any comments to the jury upon the law or facts without the same being so reduced to writing or taken down, the verdict shall be set aside or the judgment rendered thereon reversed unless at the time of submission to the jury there was no jury issue upon the evidence. The reporter shall take down all that the judge says during the trial to the jury or in their presence of or concerning such cause. . . ."

> "270.22 Charge to jury filed. As soon as any charge has been given to the jury it shall be placed and remain on file among the papers of the case. When delivered orally the reporter shall immediately transcribe the same in longhand and file it, without special compensation therefor."

It is contended that these statutory provisions were violated because appellant was unable

to obtain a copy of the instructions given to the jury until October 6, 1970, when the transcript of trial proceedings was finally completed and certified by the clerk. It is unfortunate that so much time elapsed between the conclusion of trial and the completion of the transcript. However, the record shows that the jury instructions, and all other proceedings at trial, were transcribed by the reporter. The statutes have not been violated. Furthermore, the record discloses that copies of the charge were, in fact, given to appellant's counsel and counsel for the state.

In his reply brief, appellant also alleges that no record was made of any comments by the trial judge while on the view of the land in question. However, the judge told the jury, prior to going on the view, that what they saw of the property was not to be considered evidence. Counsel was given the opportunity to call the judge's attention to important aspects of the property; and the judge would then explain it to the jury. The reporter accompanied the judge, jury and counsel on the view and was available to transcribe whatever comments the parties thought were important for the record, but evidently neither appellant nor counsel for the state saw the need to utilize the reporter's services. Clearly, the failure to make a record of the view under these circumstances cannot be considered error or violative of the statutes.

Instructions on burden of proof.

The jury was charged that appellant had the burden of proving just compensation. Appellant contends that the burden of proving just compensa-

tion should be placed on the state in condemnation cases, since it is the state's duty to pay just compensation. In Hietpas v. State (1964), 24 Wis. 2d 650, 656, 130 N. W. 2d 248, this court held that the burden of proof in eminent domain proceedings on the question of damages rests upon the landowner.

Appellant claims that the instructions relating to the quantum of evidence needed to satisfy the burden of proof imposed an unreasonable burden upon him, equivalent to requiring him to prove the value of the property beyond a reasonable doubt. The judge's instructions reads as follows:

> "The burden of proof as to both questions of this special verdict is upon the plaintiff. By burden of proof is meant the duty resting upon the party having the affirmative of an issue to satisfy or convince the minds of the jury to a reasonable certainty by a fair preponderance of the evidence of the truth of the contentions of that party. By the preponderance of the evidence is meant the evidence which possesses the greater weight or convincing power. But it is not enough that the evidence of the party upon whom the burden of proof rests is of slightly greater weight or convincing power. It must go further and satisfy or convince the minds of the jury to a reasonable certainty before the burden of proof is met."

This instruction is substantially identical to Wis

J I-Civil, Part I, 200A, which defines the ordinary burden of proof. The instruction was proper and can in no way be construed as establishing a higher-than-ordinary burden of proof.

Appellant's final contention is that the instructions on severance damages was improper as placing too great an emphasis on the loss of access to one area of appellant's land, without mentioning the severance of a different, separate parcel. A reading of the instructions convinces this court that the emphasis, if any, was not undue. We also note that the appellant did not object to the instruction as given, either at trial or upon motions after verdict. Failure to object constitutes a waiver of the objection. Jansen v. Vils (1967), 34 Wis. 2d 332 337, 149 N. W. 2d 551.

We conclude that the judgments appealed from must be affirmed.

By the Court. — Judgments affirmed.

Denial of Petitioner's Motion for Rehearing

Feb. 29, 1972

#270 Kirkpatrick v. State of Wis. (Dept. of Natural Resources)

Motion for rehearing denied, without costs.

No opinion filed.

Franklin W. Clarke
Clerk of Supreme Court.

APPENDIX B

Petitioner's Offer of Proof in re Price Paid by the State for, and Comparability of, the Risney Land to the Kirkpatrick Land which the State has Condemned

The State commenced negotiations in 1967 or early 1968 for the purchase from Joe G. Risney of a portion of his 42.75 acres of land (according to the State's own map) owned by Risney, a portion of which was within the boundaries of the Whitefish Bay State Park as defined by the Door County Board resolution, a copy of which, marked Exhibit A, is attached hereto and by reference made a part hereof. The Risney land, purchased by the State at an agreed price for said Park, is located in the Town of Sebastopol, Government Lot 2, Section 3, T. 28 N., Range 27 East, Door County, Wisconsin, lying between Jacksonport Road on the south and South Lake Road on the north. This Risney land lies just across the Jacksonport Road and about 500 yards northeasterly of the north portion of the Kirkpatrick lands.

Risney was preparing to subdivide his land purchased by the State and to offer the resulting lots for sale. After some preliminary contacts, upon telephone inquiry by Risney in February of 1969 as to the price the State was willing to pay, Risney was advised the price was $36,000 and agreed to sell for that price. Upon request for an option, the State was told to bring the option to Milwaukee for execution by Risney and his wife, and an option prepared by the State was executed

by Mr. and Mrs. Risney under date of February 25, 1969 and recorded in Door County on March 4, 1969. The subsequent deed to said lands also prepared by the State was executed by Mr. and Mrs. Risney on July 9, 1969 and recorded in Door County on July 15, 1969. The property thus purchased was described both in the option and in the deed as "containing 40.5 acres more or less" and the price therefor was in each document specified as $36,000. Copies of said option and of said deed are annexed hereto as Exhibits B and C respectively.

Assuming the portion of the Risney land not taken is correctly described in the option and in the deed, the area of the property acquired is actually less than 35 acres. Evidence and testimony will be proffered to establish (a) that the actual Risney land area purchased by the State for $36,000 was approximately 36 acres, (b) that said acreage physically is comparable to much but the less desirable portion of the 98 acres more or less of Kirkpatrick land being taken by the State, and (c) the specific portions of the Kirkpatrick lands with which the Risney land is comparable. (W. Ap. pp. 116-118).

Pre-Trial Ruling of the Trial Judge, the Honorable William J. Duffy, Circuit Judge, in and for Door County

The record may reflect that Mr. Gould, Mr. Kirkegaard and Mr. Weissinger are present. I have been advised--and I appreciate the fact that I was so advised early in the course of our pretrial conferences--that there would be a seri-

ous question with respect to the introduction of a comparable of some property owned by Risney to the State of Wisconsin and that this was by negotiation. The Kirkpatrick claim is that it was similar in nature and comparable and ought to be admitted as such to the jury in fixing the value of Mr. Kirkpatrick's property. Now I have had--and I am again appreciative of both counsel in that I have received good briefs from both sides. I have concluded after going over the briefs that while there is certainly a good deal of authority and perhaps more authority now than there used to be in favor of permitting this type of comparable evidence. But the majority of the states still adhere to the rule that it is inadmissible on the grounds that it is not a sale of a willing seller and a willing buyer. In other words it doesn't meet the test of free and open negotiations. I have therefore, decided that it's my obligation to follow the rule of the Blick, B-l-i-c-k case. I have advised counsel of this some days ago at our last pretrial of my ruling. However, I recognize that some jurisdictions like California adhere to the same rule as Wisconsin apparently, and some have departed from it at least in certain instances. I also recognize that the Blick case is an early case and that our Court hasn't considered it. I noted too that Professor McCormick favors your rule, and apparently many other students of the law of evidence favor the rule that you request. But I am satisfied that under the present state of the law in Wisconsin that I should adhere to the old rule--namely that this kind of evidence is inadmissible for the reasons given in that case. * * *
(W. Ap. pp. 165-166)

Decision on Motions after Verdict
on Offer of Proof

Motions after verdict have taken the form of a motion for judgment on the verdict by the condemnor and for a new trial by the condemnee for various reasons the chief of which is the refusal to permit evidence of payment by the condemnor to the owner of other lands claimed to be comparable.

The condemnee made a most serious and impressive argument for the admission of evidence of a so-called "Risney sale" to the state of property located about 500 yards northeasterly of the north portion of the lands taken in this case. The offer of proof indicated generally that the State paid $36,000 for approximately 36 acres. The date of the Risney transaction was February 25, 1969. The deed given pursuant thereto was dated July 9, 1969, and recorded July 15, 1969. The taking in this case occurred on October 11, 1968.

I am sure that I have given my reasons several times in the record when the matter was raised before and during the trial. Counsel for the condemnee was courteous enough to advise the Court of this proposed offer of proof and to submit a very thorough and persuasive brief in support of his position. I adhered to what I understand to be the rule adopted by our Supreme Court in the case of Blick v. Ozaukee County, 180 Wis. 45 (1923). The Court at pages 46 and 47 used this language:

". . . The great weight of authority, how-

> ever, is to the effect that the price paid in settlement of condemnation proceedings, or the price paid by the condemnor for similar land, even if proceedings had not been begun, where the purchaser has the power to take by eminent domain, is not admissible."

This appears to be the majority rule even to this date.

> "The view followed by most of the authorities considering the matter is that evidence as to the price paid by the same or another condemning agency for other real property which, although subject to compensation, was sold by the owner without the intervention of eminent domain proceedings, is inadmissible to prove the value of the real property involved." 27 Am Jur 2d Eminent Domain, §430 at 335.

Some jurisdictions have recently abandoned the majority rule in favor of permitting the jury to have this information, but I do not consider as the trial judge that I could have the choice of considering a different rule even if I personally considered it the better rule. The fact that Wisconsin has announced its position with the majority, and it still remains the rule of most jurisdictions in my judgment prevents me from considering any change in this respect. * * * (W. Ap. pp. 149-151).

APPENDIX C

Supreme Court of Wisconsin January Term 1923

IN RE CONDEMNATION OF LANDS: Blick, Respondent, vs. Ozaukee County, Appellant.

February 6—March 6, 1923.

Eminent domain; Evidence as to value of land taken; Market price; Sales in same locality; Price paid in condemnation proceedings.

(Syllabus omitted)

APPEAL from a judgment of the circuit court for Ozaukee County: C. M. Davison, Circuit Judge. Reversed.

Condemnation proceedings for highway purposes, instituted by the county board of Ozaukee County under and pursuant to secs. 1317m-6 et seq., Stats. The petition was filed with the county judge. Plaintiff, being dissatisfied with the award of damages, appealed to the circuit court. There was a trial before a jury. A verdict was rendered for $1,350. From the judgment entered thereon the county appeals.

Peter M. Huiras, district attorney of Ozaukee county, and Chas. J. Kunny of Port Washington, of counsel, for the appellant.

William F. Schanen of Port Washington, attorney, and W. T. Sullivan of Milwaukee, of counsel, for the respondent.

OWEN, J. During the trial the plaintiff was permitted to prove the amount paid by the county to an adjacent property owner as compensation for the taking of a portion of his property for the construction of the same highway involved in these proceedings. The reception of this evidence is assigned as error.

It is settled in this case that in condemnation proceedings the amount for which lands similarly situated in the same locality have been sold, where the sales are not too remote in point of time and where all the circumstances of the two situations are sufficiently similar in the judgment of the trial judge so that the comparison will aid the jury in solving the issue to be determined, the evidence may be admitted. This rule has been applied in this state only where the sales were voluntary and the result of an ordinary business transaction. Watson v. M. & M. R. Co. 57 Wis. 332, 15 N. W. 468; Washburn v. M. & L. W. R. Co. 59 Wis. 364, 18 N. W. 328; Stolze v. Manitowoc T. Co. 100 Wis. 208, 75 N. W. 987. This is also the prevailing rule in other jurisdictions. 2 Lewis, Em. Dom. (3d ed.) §662. The great weight of authority, however, is to the effect that the price paid in settlement of condemnation proceedings, or the price paid by the condemnor for

similar land, even if proceedings had not been begun, where the purchaser has the power to take by eminent domain, is not admissible. 10 Ruling Case Law, 221, 222; 20 Corp. Jur. 990; 22 Corp. Jur. 181. See, also, note to be found in 43 L. R. A. n. s. 985. The reason for excluding this evidence is thus stated in 2 Lewis, Em. Dom. (3d ed.) §667:

> "What the party condemning has paid for other property is incompetent. Such sales are not a fair criterion of value, for the reason that they are in the nature of a compromise. They are affected by an element which does not enter into similar transactions made in the ordinary course of business. The one party may force a sale at such a price as may be fixed by the tribunal appointed by law. In most cases the same party must have the particular property, even if it costs more than its true value. The fear of one party or the other to take the risk of legal proceedings ordinarily results in the one party paying more or the other taking less than is considered to be the fair market value of the property. For these reasons such sales would not seem to be competent evidence of value in any case whether in a proceeding by the same condemning party or otherwise."

Whether the compensation paid by the condemnor for other lands similarly situated may be received in evidence in condemnation proceedings has not heretofore been considered by this

court. In American States S. Co. v. M. N. R. Co. 139 Wis. 199, 120 N. W. 844, such evidence offered by the condemnor was excluded by the trial court. This was held not to be error because the preliminary question of whether the two situations were sufficiently similar to afford aid to the jury in solving the issue to be determined was decided adversely by the trial judge. Whether, in any event, such evidence was competent was neither argued to nor considered by the court. That case, therefore, does not commit this court to the admissibility of such evidence, as contended by counsel for respondent. We are, accordingly, at liberty and are disposed to follow the great weight of authority and hold that such evidence is not admissible.

There is a manifest difference between a bargain where one party has the legal right to acquire and the other must sell and a bargain where both parties are in the exercise of their own free will. One party may pay a little more or the other may take a little less to avoid the annoyance and expense of litigation, and the agreement thus reached does not necessarily indicate the fair market value of the property taken as that term is understood in the law. The infirmity of this class of evidence is more marked where the element of consequential damages forms a part of the compensation paid. That factor is as variable as the landscape and often includes intangible and aesthetic consideration. Situations legitimately comparable must of necessity be rare. Their establishment or attempted establishment would introduce aggravating and time-consuming collateral issues tending to promote confusion rather

than clarity. In the instant case the land actually taken was .7 of an acre. The land actually taken from the adjacent property owner was one acre. Under the most extravagant testimony its value did not exceed $400. At least the difference between that and the $1,000 paid represented consequential damages. The admission of the evidence as to the amount paid the adjacent property owner was not preceded by any proof of the similarity of the consequential damages sustained by plaintiff and the adjacent property owner, although there was a meager reference to it in the later testimony. However, with the recognition of such a rule, the subject could well have formed a stubborn issue upon which numerous witnesses could have been called by both parties, with distracting and unsatisfactory results. Such evidence, if admitted, in most cases would be remote, indirect, and unsatisfactory. We cannot sanction such an improvident rule.

The evidence was not only inadmissible but its admission constituted prejudicial error. The witnesses on the part of the county testified as to a number of specific items which contributed to plaintiff's total damages. The sum of these items was considerably less than $1,000, the amount paid the adjoining property owner. Assuming that there was a similarity in the damages sustained by plaintiff and the adjoining property owner, the fact that the county compromised with the adjoining property owner by paying him $1,000 was calculated to unjustly discredit the county's witnesses in the minds of the jury. That the plaintiff regarded this testimony as highly

beneficial is indicated by the persistency of counsel in pressing its introduction after the court had once excluded it. Because of its admission there must be a new trial.

By the Court. — Judgment reversed, and cause remanded for a new trial.